FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY

LEVEL 17
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

6 March 2023

[redacted]
Right to Know

By email: [redacted]

Dear [redacted]

Request for an internal review under the *Freedom of Information Act 1982*

I refer to your email dated 3 February 2023 sent to the External.FOI@fedcourt.gov.au mailbox of the Federal Court of Australia (**Court**). In that email you requested an internal review of the decision made on 2 February 2023 that you are liable to pay a charge in respect of your request for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

Authorised decision-maker

I am authorised under s 23 of the FOI Act to make decisions on behalf of the Court in relation to your internal review request.

In conducting the internal review, I am required to review the original freedom of information (**FOI**) decision and make a fresh decision on behalf of the Court.[1] I acknowledge that an internal review is a merit review process and that I am required '*to bring a fresh, independent and impartial mind to the review*'.[2]

Background

On 19 December 2022, you requested access to documents under the FOI Act. Specifically, you requested the following:

> *Under the FOI Act, I request access to the document issued by the Australian Public Service Commissioner's representative certifying that the selection process for the ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected to fill in the course of a merit based selection process for that SES Band 1 classified National Judicial Registrar vacancy complied with the Public Service Act 1999 and the Australian Public Service Commissioner's Directions 2016.*

[1] Section 54C of the FOI Act.
[2] See paragraphs 1.28, 4.117 and 9.34 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

On 2 January 2023, the Court issued a written notice to you, in compliance with s 29 of the FOI Act, advising that you were liable to pay a charge for the processing of your FOI request. That charge was estimated by the Court to be $17.50, based on thirty (30) minutes of search and retrieval time, and five and a half (5.5) hours of estimated decision-making time.

On 3 January 2023, you sent an email to the Court contesting the charge estimated in the written notice to you of 2 January 2023 and provided reasons as to why the charge should be reduced or not imposed.

On 2 February 2023, the Court made a decision to reduce the total estimated charge for the processing of your FOI request from $17.50 to $8.75, based on a reduced fifteen (15) minutes of search and retrieval time, and a reduced five and a quarter (5.25) hours of decision-making time. Accompanying that decision was a revised written notice to you, and an invoice, setting out these reduced charges.

On 3 February 2023, you sent an email to the Court seeking an internal review under the FOI Act of the Court's decision dated 2 February 2023 and provided reasons for the internal review.

Material taken into account

I have considered the following material in making my decision on internal review:

- your FOI request of 19 December 2022;
- the written notice of charge issued by the Court on 2 January 2023;
- your email to the Court of 3 January 2023 contesting the estimated charges;
- the decision issued by the Court regarding the contested charges on 2 February 2023;
- the revised written notice of charge and invoice issued on 2 February 2023;
- your internal review request of 3 February 2023;
- the records of searches conducted by staff of the Court;
- the documents identified as falling within the scope of your FOI request;
- the FOI Act and relevant case law;
- the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**); and
- the guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**FOI Guidelines**).

Decision on internal review

I have decided to exercise my discretion to further reduce the charge imposed on the processing of your FOI request from $8.75 to $3.75. The revised written notice of charge issued by the Court on 2 February 2023 was based on an estimated fifteen (15) minutes of search and retrieval time and five and a quarter (5.25) hours for decision-making time. The adjusted charge is based on fifteen (15) minutes of search and retrieval time and no charge for estimated decision-making time.

In making my decision, I have taken into account the following factors that are required to be considered under s 29(5) of the FOI Act:

- whether payment of the charge, or part of it, would cause financial hardship to you; and

- whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.

I am also permitted to, and have considered, '*other relevant matters*' in making my decision on the internal review.[3] In particular, I have given '*genuine consideration*' to the specific contentions you have made as to why the charge should be reduced or not imposed,[4] and have considered whether disclosure of the documents '*will advance the objects of the FOI Act*', even though you have not expressly framed your contention on that basis.[5]

Reasons

The decision issued by the Court regarding the contested charges on 2 February 2023 included extracts from relevant sections of the FOI Act, paragraphs in the FOI Guidelines, and case law. I will not repeat that text in providing my reasons in this internal review.

Financial hardship – s 29(5)(a) of the FOI Act

Neither your email to the Court of 3 January 2023 contesting the estimated charges, nor your internal review request dated 3 February 2023, make any suggestion nor provide any evidence that payment of the charge, or part of it, would cause you financial hardship. In the absence of any evidence indicating that financial hardship would be caused to you if you paid the charge in part or in full,[6] I have reached the same conclusion as the original decision-maker that financial hardship is not at issue in the present circumstances.

Public interest – s 29(5)(b) of the FOI Act

The FOI Guidelines provide that an applicant relying on s 29(5)(b) of the FOI Act should identify or specify the '*general public interest*' or the '*substantial section of the public*' that will benefit from disclosure of the documents requested if seeking to have the charge reduced or not imposed (s 29(1)(f)(ii) of the FOI Act).[7]

The original decision-maker considered that the estimated charged should not be reduced and/or waived on the basis of the public interest test under s 29(5)(b) of the FOI Act. The original decision-maker noted that your email to the Court of 3 January 2023 contesting the estimated charge did not identify or specify the '*general public interest*' or the '*substantial section of the public*' that will benefit from disclosure of the documents requested, nor did your email make any specific contentions about disclosure being in the public interest. Your request for internal review dated 3 February 2023 did not address these points either.

Notwithstanding the above, I have considered whether disclosure of the document requested would advance the objects of the FOI Act, namely, by '*promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government's activities*'.[8] Paragraph 4.109 of the FOI Guidelines illustrates examples in which the giving of access may be in the general public interest or in the interest of a substantial section of the public. I agree with the original decision-maker that only two (2) of those examples appear to

[3] Paragraphs 4.96 and 9.34 of the FOI Guidelines.
[4] Paragraph 4.96 of the FOI Guidelines.
[5] Paragraph 4.97 of the FOI Guidelines.
[6] Paragraph 4.103 of the FOI Guidelines.
[7] Paragraph 4.107 of the FOI Guidelines.
[8] Section 3 of the FOI Act; Paragraph 4.97 of the FOI Guidelines.

be relevant to your request, but even then, there is nothing to suggest that disclosure would '*better inform the public as to why or how [an agency] decision was made*', or that an '*important and recurring aspect of agency decision*' will be identified.

In your FOI request dated 19 December 2022, you requested the Commissioner's representative certification of the recruitment process for a particular Senior Executive Service Band 1 vacancy at the Court. In your internal review request dated 3 February 2023, you clarified that you '*have no interest in the person's signature*' in the document requested and that the Court is '*welcome to redact*' that signature before provision of the document.

As explained by the original decision-maker, the document you have requested is already on the Court's FOI disclosure log. That document is already on the disclosure log in redacted form, with the signature of a public servant redacted. In other words, there is no information in the document you have requested that is not '*already publicly available*'[9] such that disclosure will '*add to the public record*'.[10]

For these reasons, it is difficult to see that any '*public benefit may flow from the release of the documents*'.[11] I have therefore formed the view that a reduction or waiver of the charges notified to you would not be appropriate on the basis of the public interest test contained in s 29(5)(b) of the FOI Act.

Other considerations

The '*other relevant matters*'[12] I have considered in making my decision on internal review include the specific contentions you have made as to why the charge should be reduced or not imposed. In your emails dated 3 January 2023 and 3 February 2023, you contend that the document you have requested is not publicly available. You make this contention despite the Court indicating to you where the redacted document appears on the FOI disclosure log, and otherwise providing you with an opportunity '*to obtain free access*' to that document outside the FOI Act.[13]

Your emails dated 3 January 2023 and 3 February 2023 contend, in the alternative, that even if the document requested is on the Court's disclosure log, that there should not be a charge for a document that is publicly available. You also contend that the Court has '*cooked up*' the charge to unnecessarily delay or discourage you from exercising your right of access to the document.

Despite your views, the Court is entitled to charge for the processing of your FOI request under the FOI Act, FOI Charges Regulations and FOI Guidelines. You were advised in the original written notice of charge issued to you on 2 January 2023 that you are welcome to withdraw your request should you wish to access the document on the Court's disclosure log outside of the FOI Act, and that course of action is still available to you. The fact that you do not agree that the document you have requested is publicly available is not, in my view, sufficiently compelling so as to justify a waiver of the charge for the processing your FOI request.

---

[9] Paragraph 4.107 of the FOI Guidelines.
[10] Paragraph 4.99 of the FOI Guidelines.
[11] Paragraph 4.107 of the FOI Guidelines, citing *Tennant and Australian Broadcasting Corporation* [2014] AATA 452 [21].
[12] Paragraphs 4.96 and 9.34 of the FOI Guidelines.
[13] Paragraph 4.6 of the FOI Guidelines.

I note that you make a number of remarks in your request for internal review dated 3 February 2023 that I consider inappropriate.[14] Those remarks are not supported by any evidence, and I consider that they demonstrate a lack of understanding of the skill, nuance, time and consideration involved for FOI officers to sufficiently respond to FOI requests made to the Court.

Your emails dated 3 January 2023 and 3 February 2023 also make contentions with respect to both the Court's search and retrieval time and estimated decision-making time in processing your FOI request. I address those specific contentions in the sections below.

Charge for search and retrieval time

Under the FOI Charges Regulations, the Court may charge for time spent '*searching for, or retrieving, the document*'.[15] Paragraph 4.27 of the FOI Guidelines provides that this encompasses time spent consulting relevant officers, searching digital or hardcopy file indexes and files to locate documents, as well as physically locating digital or hardcopies of documents and removing them from the file.

In conducting searches for documents, s 24A of the FOI Act imposes an obligation on agencies to take '*all reasonable steps*' to locate the documents requested. While the FOI Act is silent on what constitutes '*all reasonable steps*', agencies are generally required to undertake '*comprehensive*' searches in order to fulfil that obligation.[16]

The original written notice of charge issued to you by the Court on 2 January 2023 estimated that thirty (30) minutes was required to search and retrieve any documents that fell within the scope of your request. In the charges decision issued by the Court on 2 February 2023, the decision-maker reduced that estimate and considered that fifteen (15) minutes for search and retrieval time was appropriate and reasonable. A revised written notice of charge and invoice was issued to you accordingly.

In your request for internal review dated 3 February 2023, you contested the estimated charge for search and retrieval time on the basis that you contend it should not '*take 15 minutes to find a single certification document relating to the recruitment of an identified National Judicial Registrar*'. You also query '*why are you searching for a document that an FOI official says is already published on the Federal Court of Australia's FOI disclosure log?*'

The Court's revised fifteen (15) minute estimate for search and retrieval time accounts for the amount of time to consider your request, consult the relevant officers to determine if the document requested exists, and for those persons to conduct searches of the relevant files and

---

[14] Such remarks include: '*You have merely regurgitated swathes of the FOI Guidelines while shirking the specific grounds of contention I set out in my email of 3 January 2023*'; '*the reasons you have provided in your revised charge decision are insane. I really do not think you know what you are doing*'; '*I cannot think of a farcical example having been cooked up to unnecessarily delay access or to discourage an applicant from exercising the right of access conferred by the FOI Act than your revised charge decision*'; '*There is no way that the revised charge decision is a transparent decision. It's an abuse of process...*'; '*Clearly, you have paid no heed to the objects of the FOI Act because if you had, you would realise just how deranged your insistence on my paying a fee for a document your colleague claims is publicly accessible is*'; '*Mindlessly droning... doesn't detract from the fact that your insistence on my paying a fee for a document your colleague claims is publicly accessible is deranged.*'

[15] FOI Charges Regulations, Schedule 1, Part 1, Item 1.

[16] Paragraphs 3.88 and 3.89 of the FOI Guidelines.

then extract the relevant document. I am satisfied that fifteen (15) minutes for search and retrieval time is not an unreasonable amount of time for the search and retrieval of document the subject of your FOI request having regard to the obligation to take '*all reasonable steps*' to locate the document requested.

Having regard to all of the material before me, I agree with the original decision-maker that fifteen (15) minutes is a reasonable and appropriate amount of time to impose for the search and retrieval of the document you have requested. I consider that the charge is consistent with the '*lowest reasonable cost*' principle. There is no evidence before me to suggest that if this charge was imposed you would not proceed with your FOI request.

Charge for decision-making time

Under the FOI Charges Regulations, the Court may charge for time spent '*in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of the document with deletions, including time spent:*

(a) in examining the document; or
(b) in consultation with any person or body; or
(c) in making a copy with deletions; or
(d) *in notifying any interim or final decision on the request*'.[17]

Agencies can only impose these charges for each hour after the first five (5) hours.[18]

The original written notice of charge issued by the Court on 2 January 2023 estimated the decision-making time in relation to your request at five and a half (5.5) hours. In the charges decision issued by the Court on 2 February 2023, the decision-maker exercised their discretion to reduce the estimated charge on the basis that five and a quarter (5.25) hours of decision-making time is justifiable and fairly reflects the work involved. The original decision-maker informed their decision by previous experience dealing with FOI requests of similar nature, and considered that the Court correctly applied the '*lowest reasonable cost objective*' stated in the objects of the FOI Act.[19] It is clear to me, having read the decision issued to you on 2 February 2023, that the original decision-maker gave '*genuine consideration*' to the contentions you made as to why the charge for decision-making should be reduced or not imposed.[20]

In your request for internal review dated 3 February 2023, you explain that the Court is '*welcome to redact*' the public servant's signature on the Commissioner's Representative Certificate you have requested. I note that you had not previously indicated this to the Court, either in your FOI request dated 19 December 2022 nor your email contesting the charges dated 3 January 2023. Having regard to the revised terms of your request – that you only seek a redacted copy of the document requested – I am of the view that personal consultation under s 27A of the FOI Act should no longer be factored into the Court's decision-making time. Apart from the public servant's signature which you have agreed to redact, I agree that there is no other personal information in the document that requires personal consultation under s 27A of the FOI Act. There is therefore no reason to include in the Court's estimated decision-making

[17] FOI Charges Regulations, Schedule 1, Part 1, Item 4.
[18] FOI Charges Regulations, Schedule 1, Part 1, Item 4; paragraph 4.32 of the FOI Guidelines.
[19] Section 3(4) of the FOI Act; paragraph 4.3 of the FOI Guidelines.
[20] Paragraph 4.96 of the FOI Guidelines.

time any time spent applying to the document the personal privacy conditional exemption under s 47F of the FOI Act.

Overall, I consider that the revised terms of your FOI request '*requires less work to process*' your request,[21] such that it is appropriate to reduce the charge imposed on you for estimated decision-making time. I have decided to reduce the revised estimate of five and a quarter (5.25) hours of decision-making time to under five (5) hours. As agencies can only impose charges for decision-making time for each hour after the first five (5) hours, there is therefore no charge for decision-making time in respect of your FOI request.

Exceptions to imposition of charges

Neither your email to the Court of 3 January 2022 contesting the estimated charges, nor your internal review request dated 3 February 2022, identified any of the exceptions outlined in paragraphs 4.42 to 4.50 of the FOI Guidelines.[22] I therefore agree with the original decision-maker that none of these exceptions apply to your FOI request, and conclude that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

For all of the above reasons, I have determined that the imposition of a charge for fifteen (15) minutes of search and retrieval time is reasonable and appropriate in respect of your request for documents under the FOI Act. I have therefore determined that you are liable to pay the charge set out in the further revised written notice of charge and invoice that accompany this letter.

Your Review Rights

Within 60 days of my decision, you should either:

- pay the charge or deposit in the manner specified in the revised written notice of charge issued to you on 6 March 2023; or
- apply in writing to the Australian Information Commissioner for review of the charge; or
- withdraw your FOI request.[23]

If the Court does not receive a response within 60 days from the date of this letter, your FOI request will be taken to have been withdrawn.[24]

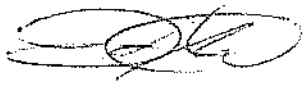
More information about Information Commissioner review, including the procedure for applying for that review, is available on the Office of the Australian Information Commissioner (**OAIC**) website at https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/.

Complaints

[21] Paragraph 4.115 of the FOI Guidelines, citing *Rita Lahoud and Department of Education and Training* [2016] AICmr 5 [32]-[33].
[22] See also section 7 of the *Freedom of Information (Charges) Regulations 2019.*
[23] Paragraph 4.119 of the FOI Guidelines.
[24] Paragraph 4.120 of the FOI Guidelines.

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint.

Yours sincerely,



R Muscat
Registrar